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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OIL COMPANY,

Petitioner,

—v.—

BARKAT U. KHAN and KHAN & ASSOCIATES,
an Illinois Corporation,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE NEWSPAPER ASSOCIATION OF AMERICA, A.H. BELO CORPORATION, ADVANCE PUBLICATIONS, INC., COX ENTERPRISES, INC., DOW JONES & COMPANY, INC., GANNETT CO., INC., KNIGHT-RIDDER, INC., THE NEW YORK TIMES COMPANY, AND WASHINGTON POST COMPANY IN SUPPORT OF PETITIONER

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Pursuant to Rule 37 (3)(a) of the Rules of this Court, this brief is respectfully submitted in support of Petitioner by Amici Curiae, Newspaper Association of America, A.H. Belo Corporation, Advance Publications, Inc., Cox Enterprises, Inc., Dow Jones & Company, Inc., Gannett Co., Inc., Knight-Ridder, Inc., The New York Times Company and Washington Post Company. The consent of the parties to the filing of this Brief has been received, and has been submitted to the Court.

INTEREST OF AMICI CURIAE

Newspaper Association of America is a nonprofit trade association representing the interests of more than 1500 member newspapers in the United States and Canada. A.H. Belo Corporation, Advance Publications, Inc., Cox Enterprises, Inc., Dow Jones & Company, Inc., Gannett Co., Inc., Knight-Ridder, Inc., The New York Times Company and Washington Post Company all publish newspapers, directly or through subsidiaries or partnerships.

It is estimated that about 60 million newspapers are sold each day in the United States, of which about a third are accounted for by the listed publishers.

A question on which this Court granted certiorari—whether supplier-dealer agreements limiting dealer markups are *per se* violations of the Sherman Act—is of importance to the relationship between suppliers and their wholesale and retail distributors and dealers. It is of particular importance to the newspaper industry. Indeed the Court's leading decision on the subject, *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968) ("*Albrecht*"), involves the relationship between a newspaper and its delivery carriers.

Almost thirty years of experience since the *Albrecht* decision argues against a rule of *per se* illegality for agreements between newspapers and their distributors on maximum prices to their customers. Instead it would be more consistent with the purposes of the antitrust laws for the question of legality

to be determined under the Rule of Reason in light of industry facts and market realities.

The experience of the newspaper industry—with its particular economics—may be helpful to the Court in considering this question.

SUMMARY OF ARGUMENT

Efficient, low-cost distribution is important to newspapers.

Newspapers may suffer losses in circulation and eventually advertising revenue if their distributors—wholesalers, home delivery carriers or other outlets—charge excessive prices. If distributors could lawfully agree not to do so, newspapers as well as readers would benefit. But, because vertical maximum price agreements are understood to be forbidden by *Albrecht*, many newspapers have guarded against excessive pricing by integrating forward into distribution themselves. Where such integration does not result in greater efficiency, it increases newspapers' costs without enhancing competition.

Albrecht's rule of *per se* illegality for vertical maximum price agreements between newspapers and their distributors is inconsistent with later authority that *per se* illegality is reserved for conduct that would "always or almost always" tend to restrict competition and decrease output. Vertical maximum price agreements are not likely to affect competition materially. If they have any effect on output it would be to *increase* output.

A rule of *per se* illegality for such agreements is particularly inconsistent with the approach now taken by this Court to ascertain competitive effects in other cases involving intrabrand and interbrand competition.

Finally, *Albrecht* makes legality depend on a single factor, whereas the true competitive impact of vertical maximum price agreements in the newspaper industry should be determined in light of the totality of market realities.

ARGUMENT

1. *Albrecht's* Per Se Rule Can Impose Unnecessary Costs

Newspapers derive revenue from two sources: readers and advertisers. For the great majority of newspapers revenue derived from readers accounts for less than half of the newspaper's revenues. Some estimates are in the range of 20% to 30%. *Facts about Newspapers 1996* (Newspaper Association of America); Compaine, *The Newspaper Industry in the 1980s: An Assessment of Economics and Technology* (1980). Most remaining revenue is derived from advertisers. Advertising revenue, however, hinges on circulation. Advertisers often make their placement decisions on the basis of cost per thousand readers. Audited circulation data is made available to them. Maintaining and increasing circulation is therefore vital to newspaper prosperity.

For the advertisers who are their primary source of revenue, newspapers face competition from a number of sources. In addition to other newspapers, competitors include direct mail advertising services, other delivery services for printed material, television broadcasters and cablecasters, radio, magazines, other publications, and more recently, on-line electronic information services. This type of horizontal competition is "interbrand" as that term is used in the Court's decision in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) ("*GTE Sylvania*"). For sales of particular newspapers some competition may take place within the distribution channels for that newspaper. Such competition, which is usually not as great as the competition for advertisers, is "intrabrand" within the meaning of *GTE Sylvania*.

Newspaper distributors are commonly given different areas of primary responsibility. Without such assignments distributors could be expected to concentrate their efforts on easier-to-serve areas with high reader density and ignore less heavily populated areas with relatively fewer readers. To remain competitive, a newspaper also wants to encourage coverage of all targeted areas at lowest cost. This may cause the newspaper to stipulate that a designated area will be served by a single distributor. Where designations do not confine dealers to particular areas, distributors may nonetheless, because of cost considerations, confine their operations primarily to the areas for which they are responsible.

If only a single distributor serves a particular area, competition with other distributors of the newspaper will not limit the amount that distributor charges customers. Intrabrand competition, by definition, does not exist in those circumstances. Unless restrained by the newspaper, therefore, or by interbrand competition, such a distributor may set its charge at a level which although acceptable to some readers is also excessive for some of them. Or to put it another way, a profit-maximizing distributor will increase price (thus reducing output) until it finds the greatest differential between its revenue and costs. In reducing output, it will be acting contrary to the long-run interest of the newspaper, which is typically to reach the greatest number of readers that can be efficiently served.

Such conflicts of interest arise particularly in the newspaper industry because a newspaper's stream of revenue from advertisers depends in large part on the success of its circulation efforts. Similar conflicts may conceivably exist between the interests of suppliers and dealers in other industries. This is a question of fact which should depend, inter alia, on whether suppliers and dealers find it most advantageous to operate at different levels of output.

A straightforward and efficient way of resolving this conflict in the newspaper–distributor context would be for the

parties to negotiate and reach agreement on the maximum charge to be made by the distributor, leaving the distributor room to charge less (and presumably make more sales) if it can profitably do so. As generally understood, however, *Albrecht* prohibits such agreements. Accordingly, some newspapers have accepted the risk of losing both subscribers and advertiser revenue because of distributor pricing. Other newspapers have adopted some form of vertical integration.

For example, a newspaper may cease dealings with independent distributors and provide all distribution service with its own employees and vehicles. Or the newspaper may continue dealings with independent distributors but may change the nature of these dealings. Instead of selling to distributors for resale, the newspaper may contract with distributors for delivery service only, or appoint them as delivery agents. The newspaper then assumes some or all of the functions of billing newsstands and subscribers, making collections, and maintaining customer lists. These arrangements allow the newspaper to control pricing to newsstands and home delivery subscribers, but at the cost of additional capital investment. In some cases efficiency may be improved; in other cases it may suffer. There is a probable loss of efficiency where, as in *Albrecht*, the newspaper would rather not be in the delivery business. 390 U.S. at 147. These arrangements have also found resistance from distributors. Integration in the newspaper industry has given rise to extensive litigation, which is summarized in Areeda & Hovenkamp, *Antitrust Law* (1996 Supplement) § 729.7.

It is respectfully submitted that unless vertical integration enhances efficiency, its consequences may not be salutary. Integration can impose additional costs on publishers, reduce entrepreneurship opportunities for distributors, and perhaps ultimately injure newsstands and subscribers by withholding the more affordable delivery service the market could otherwise provide. These consequences are not needed to preserve competition.

2. *Albrecht's* Per Se Rule Is Inconsistent with Later Precedent.

It has been a consistent theme of this Court's recent antitrust rulings that *per se* treatment is reserved for conduct that would "always or almost always tend to restrict competition and decrease output". *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20, (1979). *See also National Collegiate Athletic Ass'n* v. *Board of Regents of University of Oklahoma*, 468 U.S. 85, 100 (1984) (". . . a *per se* rule is applied 'when the practice facility appears to be one that would always or almost always tend to restrict competition and decrease output' ") (citing *Broadcast Music*); *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447, 458-59 (1986) ("we have been slow to . . . extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious") (citing *Broadcast Music*); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978):

> "There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are 'illegal *per se*.' In the second category are agreements whose competitive effects can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint. . . ."

It is therefore pertinent to consider whether a vertical agreement setting maximum prices in the circumstances described above injures competition or limits output. The answer is plain:

Single-distributor areas. In areas served by only a single newspaper distributor, a vertical agreement limiting maximum resale prices would not limit output; on the contrary, whenever a marginal subscriber renews rather than cancels, service is rendered that would otherwise be withheld. In other words, a maximum charge tends to *expand* rather than decrease output.

It is also apparent that a vertical maximum price agreement in these circumstances would not injure competition. The only competition arguably affected is intrabrand competition with other distributors of the newspaper. Where for reasons of efficiency only one distributor chooses or is designated to serve a particular area, there is rarely any significant intrabrand competition to be injured. The practical effect of a vertical maximum price agreement in a single distributor area is thus not to limit competition significantly but rather to limit exploitation of the degree of market power, however minimal, conferred by the grant of exclusivity.

Multiple-distributor areas. In those circumstances where two or more distributors may vie for circulation sales, it is equally true that newspaper-distributor agreements placing ceilings on distributor prices would tend to expand rather than limit output, if they had any effect at all.

There is also ground for concluding that competition would not be harmed in these circumstances. First, it is doubtful that the maximum price will reduce the extent of intrabrand competition. The maximum price would not prevent distributors from competing on price or service. Each could still charge as little as it wished. It is highly unlikely that the maximum price would prevent innovation or improving quality of service. Each distributor will have the incentive to increase sales and become as efficient as possible, as well as having an obligation to the newspaper to maintain standards of service to earn customer satisfaction. A newspaper would have no

incentive to place the maximum so low as to jeopardize customer satisfaction.

Second, to determine anticompetitive consequences, any potential anticompetitive effect on intrabrand competition should be weighed against the effect on *inter*brand competition. If *GTE Sylvania*'s paradigm is applied, any discernible loss to intrabrand competition brought about by the restriction would be outweighed by the obvious gain in interbrand competition. There can be no question that it is significantly procompetitive for a newspaper to try to keep its cost to customers down so as to avoid loss of business to competitors such as direct mail. The significant procompetitive interbrand effect should overwhelm any potentially anticompetitive intrabrand effect, particularly a remote one. Interbrand competition, after all, is "the primary concern of antitrust law." *GTE Sylvania*, 433 U.S. at 52. This competition has become far more serious for the newspaper industry in the nearly thirty years since the *Albrecht* decision.

3. *Albrecht's* Per Se Rule Is Particularly Inconsistent With the Principle, Expressed in *Sharp*, Favoring Analysis Under the Rule of Reason.

In 1988 this Court reviewed the interface between the rule of *per se* illegality for resale price maintenance agreements and the principle of Rule of Reason review for other vertical arrangements. *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717 (1988). The Court did so in a case involving termination of a dealer for price-cutting. The Court's rationale applies to the current issue and warrants application of the Rule of Reason.

In *Sharp* the Court pointed out that all vertical restraints have some potential to affect prices, so that giving *per se* treatment to all vertical arrangements affecting pricing would in effect destroy the normal principle of evaluating vertical restraints under the Rule of Reason. The *per se* exception

would then swallow the Rule of Reason. *Sharp* therefore held that for *per se* liability to attach to a restraint, even one affecting pricing, the restraint must do more than merely affect pricing. It must constitute agreement on a resale price, or if not a specific price, a resale price level.

By the same token, a vertical agreement setting maximum resale prices may affect pricing but is not an agreement on specific resale prices or actual price levels. As in *Sharp*, such conduct does not eliminate the dealer's ability to determine its prices but rather leaves open the possibility of lower-than-maximum pricing by the dealer.

Moreover, a vertical maximum price agreement does not pose the same threat to competition as a vertical price agreement setting specific prices or formulas for determining price. Unlike the latter, vertical *maximum* price agreements cannot assist horizontal price-fixing at the manufacturer level, since they leave distributors free to charge lower prices to consumers, and lower prices may well be in the distributor's interest where the distributor is efficient.

Also, in concluding that *per se* illegality could not be shown without agreement on price or price levels, the Court in *Sharp* noted specifically that there was a presumption in favor of a Rule of Reason standard, that departure from that standard must be justified by demonstrable economic effects, such as the facilitation of cartelizing, rather than formalistic distinctions, that interbrand competition is the primary concern of the antitrust laws and that rules in this area should be formulated with a view toward protecting the doctrine of *GTE Sylvania*. *Sharp*, 485 U.S. at 726.

All of these factors argue for testing vertical maximum price clauses under the Rule of Reason formulated in *GTE Sylvania*, which best serves the interests of interbrand competition and consumer welfare.

4. *Albrecht's* Per Se Rule Gives Excessive Weight to a Single Factor.

The basic rationale of *Albrecht* was that an agreement to fix maximum prices could jeopardize the ability of a dealer to furnish essential services to customers and thus also jeopardize the survival of a dealer:

> ". . . schemes to fix maximum prices by substituting the perhaps erroneous judgment of a seller for the forces of a competitive market, may severely intrude upon the ability of buyers to compete and survive in that market . . . . Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay." *Albrecht*, 390 U.S. at 152-53.

It is undoubtedly true that while it would seldom serve a supplier's interest to jeopardize the survival of its dealers by fixing maximum prices too low, a supplier could conceivably do so. It could also unwittingly prejudice its dealers in other ways, such as by charging so much for its products that dealers are unable to resell them profitably, or by opening additional outlets too close to an existing dealer. However, these hazards to dealers are not necessarily hazards to competition. In some circumstances each may form part of the context of an untenable restraint on competition, but in others each may result in providing competitive opportunities for third parties. Opening a more efficient dealer, for example, may be hazardous to existing dealers but desirable for better competition. To make hazards to particular dealers determinative of the outcome is to ignore other market realities and risk the very harm to competition which the Sherman Act seeks to avoid.

More specifically, the quoted passage from *Albrecht* invites the assumption that the seller may establish too low a maximum for some dealers to survive. Should courts not consider the alternative possibility that some dealers may set prices

which are too high? Newspapers' revenue comes mainly from large advertisers who choose among alternative means of delivering advertising messages—by newspapers, direct mail and other means—partly on the basis of audience reached. A newspaper's loss of audience because of high delivery charges can lead to a loss of key advertisers. This in turn can reduce the funds available for editorial quality and cause a further loss of audience, with consequent impact on all distributors, including those who have kept prices down. Thus the erroneous judgment of some distributors, seeking to enhance their own short-run profits, can bring about longer-term losses to themselves, newspapers and other distributors.

If on the other hand a newspaper is free to reach agreements with distributors on maximum prices in appropriate circumstances, the likelihood is greater that the maximums will be low enough to keep circulation at a level that will be attractive to advertisers, while still allowing distributors to profitably serve areas which are particularly costly to reach.

In short, the *Albrecht per se* rule attaches too much importance to the possibility that maximum prices will be set too low. In assessing overall competitive impact other factors are more important. For example: What are the reasons for the practice? What effects have resulted? How effective is interbrand competition in the particular case? How effective is intrabrand competition? Does the seller have market power? Does the dealer have market power? Does the dealer act on behalf of competitors of the seller? What are the relevant entry barriers? What has been the pattern of entry and exit? The answers in a particular case may support a finding that the arrangement is on balance procompetitive.

In 1990, this Court recognized that vertical maximum price-fixing may have procompetitive effects. *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 343 n.13 (1990). It is respectfully suggested that in light of the Court's analysis of such possible benefits, a *per se* rule is inappropriate. As this Court observed in *Atlantic Richfield*:

"[13]When a manufacturer provides a dealer an exclusive area within which to distribute a product, the manufacturer's decision to fix a maximum resale price may actually protect consumers against exploitation by the dealer acting as a local monopolist. The manufacturer acts not out of altruism, of course, but out of a desire to increase its own sales—whereas the dealer's incentive, like that of any monopolist, is to reduce output and increase price. If an exclusive dealership is the most efficient means of distribution, the public is not served by forcing the manufacturer to abandon this method and resort to self-distribution or competing distributors. Vertical, maximum price fixing thus may have procompetitive interbrand effects even if it is *per se* illegal because of its potential effects on dealers and consumers. See *Albrecht* v. *Herald Co.*, 390 U.S. 145, 159 (1968) (Harlan, J., dissenting) (maximum price ceilings 'do not lessen horizontal competition' but instead 'drive prices toward the level that would be set by intense competition,' by 'prevent[ing] retailers or wholesalers from reaping monopoly or supercompetitive profits'). Indeed, we acknowledged in *Albrecht* that '[m]aximum and minimum price fixing may have different consequences in many situations.' *Id.*, at 152. The procompetitive potential of a vertical maximum price restraint is more evident now than it was when *Albrecht* was decided, because exclusive territorial arrangements and other nonprice restrictions were unlawful *per se* in 1968. See *id.*, at 154; *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 375-376 (1967). These agreements are currently subject only to rule-of-reason scrutiny, making monopolistic behavior by dealers more likely. See *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 47-59 (1977).

"Many commentators have identified procompetitive effects of vertical maximum price fixing." 495 U.S. at 343, n.13 (citations omitted).

The newspaper industry is a good example of the potential for such procompetitive effects, and the absence of unequivocal anticompetitive effects. For this industry it creates a legal anomaly to view vertical maximum price-fixing as *per se* unlawful. The practice should be the subject of more careful inquiry as to competitive effects and market realities, which is to say evaluation under the Rule of Reason.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be reversed, and the case remanded with instructions to evaluate the challenged conduct under the Rule of Reason.

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